

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DEREK SUTTON, as special
administrator of the ESTATE OF
WILLIAM PEPPER,

Plaintiff,

v.

RENAL TREATMENT CENTERS WEST,
INC., a foreign corporation, and
DAVITA, INC., a foreign
corporation,

Defendants.

No. CV-10-3067-EFS

**ORDER DENYING DEFENDANTS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

This suit arises from the death of William Pepper after he received kidney dialysis treatment at a facility owned and operated by Defendants Renal Treatment Centers West, Inc. and DaVita, Inc., on January 8, 2009. Plaintiff Derek Sutton, the administrator of Mr. Pepper's estate, alleges that Defendants' employees did not properly monitor Mr. Pepper during treatment. Plaintiff contends that Defendants' employees failed to notice that Mr. Pepper's venous needle had become dislodged during dialysis treatment, which allegedly resulted in extensive blood loss and caused Mr. Pepper's death.

One of Plaintiff's theories of liability is that Mr. Pepper's dialysis "access" - the location on his body in which arterial and

1 venous needles were inserted to provide dialysis treatment - was not
2 visible at the time of his exsanguination. Plaintiff alleges this
3 lack of visibility breaches the appropriate medical standard of care.

4 This matter comes before the Court on Defendants' Motion for
5 Partial Summary Judgment, ECF No. 64. Defendants assert that a)
6 Plaintiff has no direct evidence that Mr. Pepper's dialysis access was
7 not visible, and b) any circumstantial evidence of a lack of access
8 visibility is speculative or otherwise inadmissible. Defendants seek
9 to preclude any claim or argument relating to the visibility of Mr.
10 Pepper's dialysis access at trial.

11 For the reasons set forth below, the Court finds that a genuine
12 issue of material fact precludes summary judgment at this time.
13 Defendants' motion is therefore denied.

14 II. BACKGROUND¹

15 On the morning of January 8, 2009, William Pepper began
16 outpatient dialysis treatment at the Yakima Dialysis Center
17 (hereinafter, "DaVita"), a medical facility owned and operated by
18 Defendants. At the time of his treatment, Mr. Pepper exhibited signs
19 of poor health: he was receiving controlled delivery of oxygen, and he
20 required significant assistance to move himself into the dialysis
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22 ¹ In ruling on the motion for summary judgment, the Court has considered
23 the facts and all reasonable inferences therefrom as contained in the
24 submitted affidavits, declarations, exhibits, and depositions, in the
25 light most favorable to the party opposing the motion - here, the
26 Plaintiff. See *Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir.
1999).

1 chair to receive treatment. Some DaVita staff members expressed
2 concern that Mr. Pepper was receiving outpatient - as opposed to
3 inpatient - dialysis treatment, given his poor condition.
4 Customarily, dialysis patients who are more fragile or ill require a
5 higher level of supervision than healthier patients, and thus receive
6 inpatient treatment.

7 At approximately 1:55 p.m. that afternoon - several hours into
8 Mr. Pepper's dialysis treatment - DaVita's medical staff discovered
9 that Mr. Pepper was unconscious and not breathing. A large amount of
10 Mr. Pepper's blood had pooled on the floor beneath his dialysis chair,
11 and blood also covered the chair itself and Mr. Pepper's clothes.
12 Upon discovering his condition, DaVita staff began treating Mr.
13 Pepper. Although Mr. Pepper briefly regained consciousness, he was
14 subsequently transported to Memorial Hospital, where he died at 9:20
15 p.m. that evening.

16 At the time Mr. Pepper exsanguinated, many DaVita staff members
17 were participating in a "mock audit" in preparation for an actual
18 upcoming audit by the Washington State Department of Health ("DOH").
19 During this mock audit, only two patient care technicians ("PCTs")
20 were assigned to the treatment "pod" in which Mr. Pepper and six other
21 dialysis patients were receiving treatment. One of the PCTs, Mauro
22 Hernandez, was on break and not in the treatment area at the time Mr.
23 Pepper exsanguinated, although the parties dispute how long Mr.
24 Hernandez had been on break before the incident occurred. The other
25 PCT, Bonnie Hursh, was connecting another patient to a dialysis
26 machine at the time of the incident.

1 In response to Mr. Pepper's death, DOH began investigating
2 DaVita's patient safety practices. Several weeks following Mr.
3 Pepper's death, DOH investigators visited the DaVita facility and
4 found that the dialysis accesses of four separate patients were not
5 visible to facility staff at all times during treatment. DOH also
6 interviewed the facility's administrator, Shomei Meister, and
7 determined that she did not know the proper definition of "visible at
8 all times" with regard to a patient's access. DOH concluded that
9 DaVita's policies and procedures did not properly define - and that
10 facility staff did not have a clear understanding of what constituted
11 - a "visible dialysis access."

12 **III. DISCUSSION**

13 **A. Legal Standards**

14 Summary judgment is appropriate if the "pleadings, the discovery
15 and disclosure materials on file, and any affidavits show that there
16 is no genuine issue as to any material fact and that the moving party
17 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
18 Once a party has moved for summary judgment, the opposing party must
19 point to specific facts establishing that there is a genuine issue for
20 trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the
21 nonmoving party fails to make such a showing for any of the elements
22 essential to its case for which it bears the burden of proof, the
23 trial court should grant the summary judgment motion. *Id.* at 322.
24 "When the moving party has carried its burden under Rule 56(c), its
25 opponent must do more than simply show that there is some metaphysical
26 doubt as to the material facts. . . . [T]he nonmoving party must come

1 forward with 'specific facts showing that there is a genuine issue for
2 trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
3 574, 586-87 (1986) (internal citation omitted) (emphasis in original).

4 When considering a motion for summary judgment, the Court does
5 not weigh the evidence or assess credibility; instead, "the evidence
6 of the non-movant is to be believed, and all justifiable inferences
7 are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477
8 U.S.242, 255 (1986). Courts are to be cautious when granting summary
9 judgment and may deny summary judgment "where there is reason to
10 believe that the better course would be to proceed to a full trial."
11 *Id.*

12 **B. Analysis**

13 Defendants seek partial summary judgment on the issue of whether
14 Mr. Pepper's dialysis access was visible at the time of his
15 exsanguination. Defendants assert that a) Plaintiff has no direct
16 evidence that Mr. Pepper's dialysis access was not visible, and b)
17 that any circumstantial evidence on this point is speculative or
18 otherwise inadmissible. Defendants therefore seek to preclude any
19 claim or argument relating to the visibility of Mr. Pepper's dialysis
20 access at trial.

21 In response, Plaintiff points to circumstantial evidence of a
22 visibility issue, including, *inter alia*, the opinion of Plaintiff's
23 proffered expert, Tricia West, R.N. Defendants deposed Ms. West on
24 January 11, 2012. During that deposition, Ms. West opined that Mr.
25 Pepper's substantial blood loss was, by itself, evidence of a problem
26 with the visibility of Mr. Pepper's access:

1 Q. Now, you've, I think, inferred from the fact that Mr.
2 Pepper's needle dislodged and he lost blood that it
3 was not properly being visualized. Are you aware of
any evidence showing there was any problem with
visibility of Mr. Pepper's access either on the [date
of the incident] or ever?

4 A. Yes.

5 Q. What is that evidence?

6 A. The evidence is that no one recognized that there was
a thousand cc's of blood missing out of the patient
. . . .

7 West Dep. 65:7-17, ECF No. 68, at 61.

8 Ms. West later clarified her opinion that Mr. Pepper
9 exsanguinated because either Mr. Pepper's dialysis access was not
10 visible, or DaVita's medical staff was not properly monitoring his
11 treatment:

12 Q. Okay. And I asked you before whether there's any
13 evidence for lack of visibility of Mr. Pepper's
14 access. You agreed there was no direct evidence that
his access was not visible. Mr. De La Cruz just
clarified that, I think, with you.

15 A. Something was not right. Was it not visible, or were
16 they not looking? I can't answer that, but clearly
it wasn't visualized. I don't know [if it was]
because it was hidden or [if it was] because nobody
was even there to look at it. Equally as bad.

17 Q. But you agree there was no direct evidence of a
problem with visibility. Now -

18 A. No, no, no, no. I don't agree with that. There was
19 a problem with visibility. The problem was *either*
nobody was looking, or it wasn't visible.

20 *Id.* 118:4-18, ECF No. 68, at 62 (emphasis added); *see also* West Decl.

21 ¶ 10, ECF No. 74, at 5-6 ("I believe that [had Mr. Pepper's] access
22 been visible and [had DaVita's staff] observed the dislodged needle,
23 they would have intervened and stopped the blood loss.").

24 Defendants argue that Ms. West's opinion about these two
25 potential causes for Mr. Pepper's exsanguination amounts to
26 impermissible speculation. The Court disagrees. Ms. West's opinion

1 that exsanguination would not have occurred *but for* one of these two
2 preconditions is a medical opinion as to causation. Ms. West has not
3 speculated about which precondition actually occurred, *see id.* ("Was
4 it not visible, or were they not looking? I can't answer that[.]");
5 for that matter, she has not opined about which precondition was more
6 likely to have occurred. Instead, she indicates that this accident
7 could *not* have occurred *unless* one of these preconditions was
8 satisfied. There is nothing speculative about this opinion.

9 Moreover, Defendants are free to challenge the admissibility of
10 Ms. West's opinion pursuant to Federal Rules of Evidence 702-704 and
11 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
12 Defendants may also offer their own expert opinions as to causation,
13 or they can demonstrate the fallacy of Ms. West's opinion by
14 proffering other reasons, beyond the two given by Ms. West, why Mr.
15 Pepper exsanguinated. In other words, Ms. West's opinion - that one
16 of the two preconditions must have been satisfied for the injury to
17 have occurred - can be tested, challenged, and ultimately discredited
18 or disproved. It is not speculation.

19 At present, Ms. West's opinion is sufficient to warrant denial
20 of Defendants' motion for summary judgment. Plaintiff contends, and
21 Defendants apparently do not dispute, that *either* precondition would
22 independently constitute a breach of the standard of care Defendants
23 owed to Mr. Pepper. *See, e.g.,* Plf.'s Opp'n Mem. at 15 ("[B]oth
24 scenarios amount to a breach in the standard of care."). Under this
25 theory, Plaintiff need not offer any evidence that Mr. Pepper's access
26 was not visible. Instead, Plaintiff can prove that 1) Mr. Pepper

1 exsanguinated, 2) he would not have exsanguinated unless either a) his
2 access wasn't visible or b) Defendants' employees were not properly
3 monitoring his treatment, and 3) either of these potential causes
4 constitutes a breach in the standard of care Defendants owed to Mr.
5 Pepper. As long as Plaintiff can show that at least one of the
6 preconditions occurred, and as long as either precondition
7 independently constitutes a breach in the standard of care, the
8 determination of *which* specific precondition actually occurred is
9 immaterial: either way, Defendants were negligent.

10 Alternatively, even if only the first precondition (that Mr.
11 Pepper's access was not visible) constitutes a breach in the standard
12 of care, Defendants are still not entitled to partial summary
13 judgment. Given Ms. West's opinion that at least one of the
14 preconditions must have occurred, Plaintiff can prove that Mr.
15 Pepper's access was not visible by *disproving* the other precondition
16 (e.g. by showing that Defendants' employees were properly monitoring
17 Mr. Pepper). Put another way: if at least one of the two
18 preconditions must have occurred to cause Mr. Pepper's exsanguination,
19 and if the second precondition is disproved, by process of
20 elimination, the first precondition must have occurred.²

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24 ² See, e.g., Sir Arthur Conan Doyle, *The Sign of Four* 111 (1890)
25 (containing the oft-quoted truism by legendary fictional detective
26 Sherlock Holmes, that "when you have eliminated the impossible,
whatever remains, however improbable, must be the truth").

1 IV. CONCLUSION

2 Ms. West's opinion offers Plaintiff a sufficient factual basis
3 to present his claim that Mr. Pepper's access was not visible to the
4 jury. The Court therefore need not reach Plaintiff's argument that
5 the DOH investigation report also provides sufficient circumstantial
6 evidence of an access visibility issue, and whether the report is
7 admissible for that purpose. Because Plaintiff has demonstrated a
8 genuine issue of material fact on the question of access visibility,
9 Defendants are not entitled to partial summary judgment.

10 This ruling does not preclude Defendants from challenging Ms.
11 West's opinion, either procedurally in a *Daubert* hearing or
12 substantively at trial. And if successful, Defendants remain free to
13 move for a directed verdict on this issue. In the meantime, however,
14 Defendant's motion, **ECF No. 64**, is **DENIED**.

15 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
16 Order and provide copies to all counsel.

17 **DATED** this 12th day of February 2013.

18 s/ Edward F. Shea
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EDWARD F. SHEA
20 Senior United States District Judge
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